Supreme Court, U.S.
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No. 92-7

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PREMA JYOTHI,
Petitioner,

vs.

SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In propia persona petitioner claims the Federal question to be an abrogation of the Seventh Amendment. Petitioner claims somehow the right to trial is abrogated as a result of cases being dismissed pursuant to a discretionary dismissal statute.

Petitioner presents no Federal question. If every case subject to discretionary dismissal at the State level involved the Seventh Amendment of the Constitution of the United States, then every discretionary dismissal ordered by the State Court would be subject to review by the United States Supreme Court.

2. The granting of the Motion to Dismiss was proper. No abuse of discretion has been shown.

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INTRODUCTORY PRAYER

Respondent, Southern California Rapid Transit District, respectfully prays that the United States Supreme Court deny petitioner's Writ of Certiorari.

OPINIONS BELOW

On November 8, 1990, the Municipal Court of the Los Angeles Judicial District entered a discretionary dismissal in this case pursuant to Code of Civil Procedure Sec. 583.420(A)(1) for delay in service of the complaint, served 1094 days after the filing thereof (see Petitioner's Appendix No. 1).

On June 13, 1991, the Appellate Department of the Superior Court of the County of Los Angeles affirmed the dismissal on appeal finding no abuse of discretion had been shown. (See Petitioner's Appendix No. 2.)

On July 16, 1991 the Appellate Department denied a petition for rehearing. (See Petitioner's Appendix No. 3.)

On July 23, 1991 a corrected order was filed denying rehearing only. (See Petitioner's Appendix No. 4.)

On January 10, 1992 the Court of Appeal for the State of California, Second Appellate District, Division Four, denied Certiorari. (See Petitioner's Appendix No. 5.)

On March 11, 1992 the California Supreme Court denied a Petition for Review. (See Petitioner's Appendix No. 6.)

JURISDICTION

Petitioner contends jurisdiction of this honorable court is based upon 28 U.S.C.A.

Section 1257(a). (See Petitioner's Appendix No. 9.)

Respondent, Southern California Rapid Transit District, contends that there is nowhere involved the Seventh Amendment to the Constitution of the United States nor the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF CASE

Petitioner, Jyothi, formerly known as Petitioner Gorshow, was purportedly a passenger on an RTD bus and was injured thereon allegedly due to the negligent operation of the the subject bus.

Petitioner filed a complaint in the Los Angeles Municipal Court through her then attorney of record on July 28, 1987. Petitioner then served an amended complaint 1094 days later.

Respondent filed a Motion to Dismiss pursuant to California Code of Civil Procedure Section 583.420(A)(1), which motion was granted. Petitioner, on appeal to the Appellate Department of the Superior Court, protested the dismissal as an abuse of discretion.

The first time the Federal issues were raised was before the Appellate Department of the Superior Court by way of a Petition for Rehearing after the Appellate Department affirmed the dismissal.

The Petition for Rehearing was denied. (See Petitioner's Appendix No. 3). On Appeal, on January 10, 1992, the Court of Appeal of the State of California, Second Appellate District, Division Four, denied Certiorari. The California Supreme Court denied review on March 11, 1992.

REASONS FOR DENYING WRIT

Introduction

I. PETITIONER HAS PRESENTED NO FEDERAL QUESTION.

Discretionary dismissal of a case does not abrogate the right to trial by jury as set forth in the Seventh Amendment to the United States Constitution. If every discretionary dismissal raised Seventh and Fourteenth Amendment questions, state courts would no longer have any discretion.

II. THE GRANTING OF THE MOTION TO DISMISS DISMISS WAS PROPER. NO ABUSE OF DISCRETION HAS BEEN SHOWN.

Respondent, Southern California Rapid Transit District, brought a Motion to Dismiss pursuant to California Code of Civil Procedure Section 583.420(A)(1) (see Petitioner's Appendix No. 12). The motion was granted.

A reviewing court should not substitute its opinion for the trial court's decision dismissing an action for delay in prosecution pursuant to motion or sua sponti unless clear case of abuse is shown or unless there has been a miscarriage of justice. Shaffer v. Weber (1991) 233 Cal.App. 3d 944.

In the Municipal Court, the Honorable Soussan Bruguera considered the motion brought pursuant to the discretionary dismissal statute, CCP Section 583.420(a)(1). The court considered each and every single one of the factors enumerating California Rule of Court 373 and even stated so at the hearing of the motion to dismiss. The motion was granted.

The ruling should not be disturbed. The only question on review is whether or

not the dismissal was within the court's broad discretionary power. The California Appellate Court in Luti v. Graco, Inc. (1985) 170 Cal.App. 228, has indicated that a delay in serving the summons and complaint is accorded less review tolerance than one in which service was timely, but the case is not diligently pursued. In the California case of Denham v. Superior Court (1970) 2 C3d 577, the court stated at page 566, in quoting Loomis v. Loomis, 181 Cal.App. 2d 345 stated:

> "Discretion is abused whenever the court exceeds all bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion and unless a clear case of abuse is shown and unless

> there has been a miscarriage of justice, a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power."

Plaintiff's complaint was filed July 28, 1987. She maintains that she was substituted in propia persona on April 11, 1988. She had counsel for nine months and no service was attempted. From April, 1988 to July 27, 1990, absolutely no attempt at service was made.

Plaintiff's excuse for lack of service was that she relied upon the advice of her attorney to wait until all the medical records were obtained. This was erroneous advice. Further, plaintiff was apparently advised that the service of the complaint must be made within

three years. This was erroneous advice which plaintiff Jyothi relied upon. Further, petitioner was apparently advised that there was a one year statute of limitations as to an action against a governmental entity. This was also erroneous advice. (See Petitioner's Appendix No. 15.)

III. IN PROPIA PERSONA LITIGANTS ARE RESTRICTED TO THE SAME RULES OF EVIDENCE AND PROCEDURE AS REQUIRED OF LICENSED ATTORNEYS.

In arguments made in the courts below, Petitioner argued that because the RTD was represented by an attorney and petitioner was appearing in propia persona, she should somehow be excused from not complying with the service deadlines.

The California court in Williams v. Pacific Mutual Life Insurance Co. (1986) 186 Cal.App3d 941, stated at page 944:

> "At the outset, we acknowledge the general rule that an appellant appearing in propia persona is to be treated like any other party and is entitled to the same, but no greater, consideration than other litigants and attorneys. (Taylor v. Bell, (1971) 21 CA3d 1002, 1009; Monestero v. Los Angeles Transit Co., (1955) 131 CA2d 156, 160.)

The court in Lombardi v. Citizens National Trust Bank (1955) 137 CA2d, 206, stated at page 208:

> "A litigant has a right to act as its own attorney (Gray v. Justices Court (1937) 18 CA2d 420) but in doing so, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise ignorance is unjustly rewarded."

Plaintiff's argument below that she was ignorant of the two year

discretionary dismissal statute was of no merit. Indeed, reviewing courts below agreed with the Lombardi court which stated at 209, quoting from Ackerman v. Southern Arizona Bank and Trust Co., 39 Arizona 484, 7 Pacific 2d 994:

> "A layman with resources, who insists upon exercising the privilege of representing himself, must expect and receive the same treatment as if represented by an attorney - no different, no better, no worse."

IV. A DELAY IN SERVING THE SUMMONS AND COMPLAINT IS ACCORDED LESS REVIEW TOLERANCE THAN ONE IN WHICH SERVICE TIMELY, BUT THE CASE IS NOT DILIGENTLY PURSUED.

The court in Luti v. Graco, Inc., (1985) 170 Cal.App.3d 228 stated at page 233:

> "An unjustified delay in serving the summons and complaint is accorded less appellate tolerance than one in which service is timely, but the case is not diligently pursued. The difference in treatment, although never

> articulated, to our knowledge, makes sense. A defendant who is served, has the ability to prepare a defense, notwithstanding the plaintiff's inactivities; the same is not generally true of an unserved defendant."

V. THE FILING OF A GOVERNMENTAL TORT CLAIM DOES NOT EXCUSE PETITIONER'S DUTY TO PROSECUTE THE ACTION DILIGENTLY. RESPONDENT HAD NO LEGAL DUTY TO DO ANYTHING MORE THAN MEET THE PETITIONER STEP BY STEP.

In County of Los Angeles v. Superior Court, (1988), 203 Cal.App3d 1201, the trial court stated at page 212, that knowledge of the claim was:

> "Quite beside the point, since neither was the defendant, nor defendant's insurer aware that the complaint had been filed...until defendant was served with the summons, it was under no legal duty to search the records to see if a complaint had been filed or take any steps in the pending action...defendant has no legal duty to do

> anything more than meet the plaintiff step by step, beginning with the service of the summons."

VI. PETITIONER HAS BEEN TREATED NO DIFFERENT THAN ANY OTHER PLAINTIFFWHO SERVED THEIR COMPLAINT 1094 DAYS AFTER FILING.

In Brand v. Miller (1973) 8 C3d 855, 506 P 2d 212, the Supreme Court of California held at 861:

> "This principal of "equal protection" preserved by both the State and Federal Constitutions... does require that, at a minimum, "persons similarly situated with respect to the legitimate purpose of the law receive like treatment."

In Jacobs, Visconsi & Jacobs v. City of Lawrence, 927 F 2d 1111 (1991) 10th Circuit, the Federal Court held at 1118:

> "___ violation of equal protection occurs when the government treats someone differently than another who is similarly situated."

Petitioner has been treated no

different than any other person similarly situated. She filed her complaint and served the same 1094 days thereafter. She was subject, like all plaintiffs, to the discretionary dismissal statute enumerated in California Code of Civil Procedure Section 583.420(a)(1). The courts below, at all levels, considered her arguments and affirmed the lower court's ruling of dismissal.

CONCLUSION

The Petition for Writ of Certiorari should be denied. The state courts must not be divested of their discretionary power. No Federal issue has been presented and there has been no abrogation of the right to trial.

For all the foregoing reasons, Real Party in Interest, Southern California Rapid Transit District, respectfully

prays that this Petition for Writ of Certiorari be denied.

Dated: July 17, 1992.

Respectfully submitted,

BONELLI, HEIB, BONELLI & BOOTH

By: _____
JOHN G. BONELLI, Attorney for Respondent SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT